THE STATE OF THE *Ecclesiastical Courts* DELINEATED.

WITH

REMARKS ON THE Resolutions *of the* Committee

Appointed by PARLIAMENT for their

INSPECTION and REFORMATION.

AND

The METHODS of Proceeding in the *Ecclesiastical Courts*, compared with TRIALS by JURIES at *Common Law*.

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S T A T E

OF THE

The STATE of the ECCLESIASTICAL COURTS delineated, &c.

POlitical Conſtitutions, no more than human, commence perfect at once. The natural Body by ſlow and imperceptible Gradations approaches to Maturity, and by a proper Care, and due Application of Nutriment, arrives to its higheſt Perfection. There is indeed this Difference between Bodies *Politic* and *Natural*, that as the latter iſſue from one *common Parent*, and are *ſimilarly* formed and conſtituted of the *ſame Limbs* and *Organs*; ſo the former having no *common Genus*, are varied and diverſified in *different* Moulds; are the Productions of *Will* and *Choice*, which frame various Methods of Adminiſtration, and adopt ſingular Habits, Modes, and Peculiarities. Thus the Diſpenſations of Juſtice and Power are diſtributed into different *Channels*, which wear deeper and deeper in the Conſtitution, in Proportion to the *Duration* of the *Current*.

All the various Branches of a political Conſtitution, pullulated from the main Body in the long

Track of Time it is *growing*, are Limbs of that Body, equally natural and eſſential thereto, as the ſeveral Parts of a human Body. And a ſudden Amputation of any one of them does not always terminate in the meer ſimple Loſs of that Member; but the whole muſt neceſſarily be affected and diſorder'd thereby.

I am apprehenſive theſe Poſitions will not be ſo well reliſh'd by thoſe, whoſe confin'd Underſtandings limit all the Relations in human Nature to thoſe diſcernible in the narrow Sphere of their own Obſervation and Experience. To ſuch Men, who view only the *Surface*, the diverting any little *Rivulet* of the State from its *wonted* Courſe, appears to be attended with no other Conſequence than the *firſt* Trouble of *cutting another*.

'Tis the unskilful and raw State-Phyſicians, who upon all Occaſions have recourſe to Rec ſion. If any *peccant* Matter appears in the *Circulation* of Juſtice, they immediately cry out a *Gangreen*, a *Mortification*. A few *cutaneous Eruptions* are precipitately denominated the *Plague*, or an incurable *Contagion*. Inſtead of endeavouring to throw off the noxious Humours by proper Applications, they are for eradicating the whole Limb, and for *ſtopping up* the Current, inſtead of *purging* and *cleanſing* it.

The accurate, nice, and experienced Obſerver ſtudies the Habits, the Conſtitution, the Exerciſe, and Diet of his Patient, by which Means, he, with Facility

lity and Expedition, by proper *Diſcharges* removes a Spring Ague or an Autumn Surfeit, which by wrong Judgment have been often converted into malignant *Fevers* or violent *Inflammations*. We may with Safety aſſert, that more uſeful Knowledge in *Government* as well as in Phyſick has been acquir'd by a Courſe of Experience and Obſervation, than from the moſt profound and elaborate Speculations of the acuteſt Philoſopher.

The Political Body is equally myſterious with the Natural; and the Experience of paſt Ages is a ſafer Guide for its Conſervation than the moſt plauſible Schemes of the ſubtileſt Theoriſt or moſt conſummate Projector; becauſe none ſee the whole *Courſe* of its Progreſſion, and how ſtrongly the ſeveral Parts are *cemented* together by *Time* and other *Accidents*: We can at beſt but ſee *how it is*, while we remain ignorant *how it came to be ſo*.

The Relations of the ſeveral Individuals to one another in a conſiderable Community, as well as their different Paſſions and Humours, can never be known to any Degree of *Certainty*, even by the moſt ſagacious Politicians. The Standard and Meaſure of the Peoples Affections and Inclinations, (which are directed to different Points at different Times, impell'd thereto by the external Phantoms and Deluſions of ſelf-intereſted Men) cannot be aſcertain'd but by a long and attentive Experience.

It hath been well obſerved by ſome able Politicians, that when Diſorders abound in the State, the Way to reſtore it to its primitive Health and Tranquillity, is to reduce it to thoſe *Principles*, and to direct it by thoſe *Maxims*, upon which it was governed before its Malady appear'd. This is corroborative of what we before obſerved; that *Uſage* and *Cuſtom* are much more to be depended on, than the fineſt-ſpun ſpeculative abſtract Reaſoning in State Emergencies or Diſorders. For if reducing a State to its *firſt Principles* is the beſt Way to remove any Diſtemper; it cannot be denied but that preſerving the State always on the ſame Principles, or adhering ſteadily to the uſual Courſe of Adminiſtration is the beſt Preſervative againſt all Shocks, Viciſſitudes, or Convulſions in our Conſtitution.

I was led into this Track of Reflections by the current Converſation of the Town on the intended Regulation of the *Eccleſiaſtical Courts*.

Tho' I have always viewed the Practice of ſome of theſe Courts with no ſmall Concern, have always thought many of their Meaſures an Abuſe and Perverſion of the Deſign of their Inſtitution, and have always ardently wiſhed to ſee a Regulation; yet methinks, we ſhould not, out of Malignancy and Abhorrence to the Behaviour of ſome Mal-Practicers, overturn the very Foundation and Baſis of that Eſtabliſhment, *good* and *rightful in itſelf*, and highly conſiſtent with the Nature of our *Conſtitution*.

The

The Offences and Miſ-conduct of ſome few Adminiſtrators of a wiſe and good Law, cannot, without the groſſeſt and moſt palpable Violation of Reaſon and Juſtice, be urged for the entire *Subverſion* and *Extermination* of it, much leſs a Syſtem of Laws and Practice (by Practice I mean theſe commendable Uſages in Courts of Juſtice, continued uniform from Time immemorial, which gives them the Sanction of a Law) eſtabliſhed by the higheſt Authority, and confirmed by the longeſt Experience, as antient a Branch of the Conſtitution as is to be found among the Records of Antiquity, totally demoliſhed, out of Reſentment to the unjuſtifiable Practices of a few of its *Miniſters*.

I would by no means be underſtood to *dictate* to the *Legiſlature*, or *affect* to inſtruct that wiſe and auguſt Aſſembly, yet as an *Engliſhman*, I hope, free from any Imputation, I may preſume to put in my Claim to offer ſuch Thoughts as occur to me, on any great and momentous Point in Agitation.

With the higheſt Deference and Regard to the Authority of *Parliament*, I can by no means be induced to think that giving all the *Reſolutions* of the *Committee* the Force of a Law, would in any wiſe contribute to the Public Utility, or tend to a further Preſervation or Extenſion of our Rights and Immunities.

Tryals by *Juries* muſt be allowed a very valuable Privilege and Security to the Liberty of a free People; but

but as the Power now exerciſed by *Juries* hath hitherto been found ſufficient for the Preſervation of them for many hundreds of Years, I cannot agree, that after ſo long Experience, to the giving them further Cognizance in Cauſes never yet triable before them, contrary to the *immemorable Uſages* and *invariable Cuſtoms* of the Land, as well as contrary to *MAGNA CHARTA* itſelf; and more eſpecially when we conſider, that if the Trial of any Fact of Eccleſiaſtical Cognizance, now determinable by an Eccleſiaſtical Judge, be transferred into the Courſe of the Common Law, ſuch Tranſlation of Juriſdiction effects a great Innovation in the Fundamentals of our happy Conſtitution. For,

As our Conſtitution now ſtands, every Fact of Eccleſiaſtical Cognizance is ultimately determinable by his Majeſty, who is the *dernier Reſort* in all *Eccleſiaſtical Cauſes*, or ſuch to whom he ſhall delegate that Authority.

But if it be enacted, that the ſame Fact, now triable by the *Eccleſiaſtical Judge*, be tried by a *Jury*, according to the Cuſtoms of *Weſtminſter-hall*, all Conteſts relating to the Regularity or Validity of any controverted *Verdict*; and indeed every Diſpute that ariſes while the Cauſe is under the Juriſdiction of the *Secular Court*, will be determinable in the *Houſe of Lords*, and is therefore depriving his *Majeſty* of a Part of his *Supremacy* and *ultimate Juriſdiction*, to the Encreaſe of Power in other Branches of the *Legiſlature*.

giſlature. And ſuch Alteration, by enervating the Power of the Crown, and throwing too much into another Scale, muſt neceſſarily tend to the deſtroying of that Balance, by the due Preſervation of which, we can alone be free from any Apprehenſions of *Anarchy* on the one Hand, or *Tyranny* on the other.

There is ſtill another great Danger to the State, attending the weakening the Authority of that Part of the Civil Law, which continues to be exerciſed in the Eccleſiaſtical Courts.

It would be extremely hazardous and very impolitick to have the State ſtript and left quite deſtitute of Civilians, eminent for their profound Knowledge in the *Civil Law*, and the Law of Nations; which, by the Study of our Municipal Laws only, can never be attain'd to.

But this muſt be the Caſe, provided what now comes under the Cognizance of Eccleſiaſtical Courts be transferred to the Courts of Common Law. For theſe Courts are the Fountain Head of *Civilians*, and have in all Ages, as well as in our own, produced a Competency of Men eminent for their Knowledge in the Laws of Nations, admired for the Force and Perſpicuity of their Reaſoning, as alſo for the Power and Sweetneſs of their Oratory and Addreſs; and, in Proportion to their Number, hardly to be equalled by any other Body of Students in the Nation.

This

This Body of Men, bred up to, and always exerciſed in the Civil and National Laws may be, becauſe they frequently have been, of great Service to the State in any perplexed Situation of National Affairs, when Queſtions may ariſe in the Councils of State, concerning the Conformity of any intended *Expedition* or *Enterprize*, to the Laws of Nations, by which *Princes* are to govern and conduct themſelves.

Moreover, in every *Maritime Nation*, there is an indiſpenſible Neceſſity for the Subſiſtance of a Court of *Admiralty*, for trying ſuch Crimes, and determining ſuch Conteſts, relating to Mens Properties, which ariſe upon the *High Seas*, and within its Juriſdiction. The Proceedings in this Court muſt be governed by the *Civil Law* and *Law of Nations*, and rendered conformable to their Maxims and Uſages; becauſe not only the Right of Property between Subject and Subject of the ſame or different *Princes* is determin'd, but between the *Prince* and Subjects of other *Princes*, or between one Crown'd Head, and another Crown'd Head.

Wherefore the *Municipal Laws* of one Kingdom can never be a juſt Rule whereby to determine a Right between one Kingdom and another of different Municipal Laws amongſt themſelves. The *Civil Law* therefore, which is an Univerſal National Law, and all its *Maxims* for deciding theſe Controverſies, commonly received, approv'd and eſtabliſh'd by all Nations,

tions, muſt be the Meaſure of Right and Wrong in this Province of Juriſdiction.

But upon a juſt Enquiry into the true State of this Juriſdiction, we ſhall find it of no ſmall Moment and Concern, ſince as well the Property of *Princes* and *Commonwealths*, as that of private Perſons is determined here: And in ſome extraordinary Caſes, and peculiar Conjunctures, National Peace or War may depend on the Wiſdom and Juſtice of their *Deciſions*. The Decree of a *bad Judge*, or Advice of an *unskilful Advocate*, may involve a whole Nation in Blood and War. However, notwithſtanding the manifeſt and indiſputable Importance of this *Court*, the Profits and Emoluments ariſing therefrom are not ſufficient to ſupport *two ſingle Advocates*; ſo that without ſome other Source than this, to produce ſuch a Number of *Civilians* as are abſolutely neceſſary to exiſt in the Community, it will be impoſſible ever to have them.

Should it be ſaid, a competent Number of expert and profound *Civilians* may be raiſed in the *State* by ſome other Inſtitution of Students, maintain'd and paid, to qualify themſelves for ſerving their Country in the particular Circumſtances above taken Notice of, without having their Subſiſtence from Courts of Juſtice govern'd by the *Civil Law*: Should this be objected, I would anſwer, that it is utterly impracticable, and the Experience of all Ages confirms the Veracity of what I am about to reply; *viz.* That no

Men arrive to ſuch Perfection in the Study of any Branch of the Law, or in any Sciences whatever, by a recluſe theoretical Life, as thoſe who have the Advantage of Practice. Every Branch of Knowledge acquir'd by *Practice* and *Experience*, becomes *permanent* and *deeply engrafted* in the Mind, and renders the Underſtanding more capacious, hail, and robuſt; but that ſuperficial and tranſient Knowledge, obtain'd by an *eaſy* Lecture, or a momentary pleaſeing Obſervation, never produces a great and celebrated Proficient: Beſides, it is certain, Men who are paid, in order to ſtudy, will never take that Pains in it, and purſue it with that Vigour and Application, as thoſe who ſtudy in order to be paid.

Purſuant to my Deſign in View, I ſhall now conſider the natural Conſequences which muſt neceſſarily attend the Removal of *Trials* of a Criminal Charge, and of *Eccleſiaſtical Cognizance*, into the Courts of *Common Law*; and ſhew, how ſuch a grand Change in our Conſtitution, will unavoidably affect the Subjects in general.

As the Experience of all Ages, and civiliz'd Nations, hath born its Teſtimony of the Expediency, and even abſolute and indiſpenſible Neceſſity of an eſtabliſh'd Religion; ſo when ſuch an one is interwoven with our Conſtitution, and the Order, Diſcipline, and Oeconomy thereof, is fix'd and regulated by certain Laws and Canons, theſe Laws and Canons ought moſt ſacredly to be reg[illegible]; and, to enforce

enforce Obedience thereto, merit the higheſt Sanction of Civil Authority, as much as any other Political Inſtitutions whatſoever.

When once the Laws, which ſupport the Authority, Dignity, and Honour of *Religion*, are diſdain'd, thought ſlight of, and vilified, *Religion* itſelf muſt decay. When the wiſe *Inſtitutions*, which uphold the Head of Religion, are annull'd and abrogated, all Virtue, Moral Honeſty, and Religion, will grow unfaſhionable, and in conſequence thereof, a greater Contempt of Civil Society in general, will imperceptibly ſteal upon the People.

This ſagacious and polite Age, this Age of Reformation and Innovation, has been very free and licentious in its Satire and Sarcaſm againſt all Religion, and vented its Spleen and Acrimony at every ſacred Inſtitution that conduces to preſerve Peace and Tranquillity in the State. Should theſe *upſtart Noveliſts* and *Refiners*, theſe *modiſh Religioniſts*, be countenanc'd by the *Legiſlature*, which God forbid! we can expect little elſe than a Scene of unparallel'd Immorality and Diſſoluteneſs; ſo that in half a Century, or leſs, the Maſs of the People will ſhake off the Fetters of Civil Obedience. Should once the conſcientious Tyes, Motives, and Reſtraints of Religion, be defac'd and obliterated, it requires no Prophetick Genius to preſage, that the Majority of the indigent and laborious (who are incapable, from the Power and Efficacy of mere Reaſon, to behold the Charms, Symetry, and

Proportion of Virtue, or the Neceſſity of Government of any Kind) will ſoon exhibit little Regard for Civil Authority, or Magiſtracy of any Degree whatſoever.

This would be the moſt effectual Step towards a State of Nature, a State of Diſorder, Confuſion, and Savageneſs; this would be no trifling Advance to the Extirpation and Baniſhment of Letters and Humanity, and to the abſolute Degeneracy of human Nature. The poor, neceſſitous, and laborious then would never, with Fear and Trembling, ſee their Neighbours envelop'd in Affluence, while they were deprived of the Neceſſaries of Life; they would never cultivate and manure the Law, nor improve the Manufactures of their Country, for others to enjoy the chief Emolument of their Induſtry: No, they would in theſe unhalcyon Days, violate Laws without Remorſe, ſatisfy their own Exigencies and Paſſions without Limits, and imagine themſelves as deſerving of Equipages and Luxuries, as much as the greateſt *Noblemen* or *Gentlemen* in the Kingdom.

The utmoſt that human Laws can effectuate, is to put Offenders to Death; but was it not out of a Dread and Horror of a future Puniſhment, which has a great Power over the Minds of the Bulk of the Nation, the Loſs of Life would be little Worth, to that great Number, whoſe Circumſtances make them think it of no Value. To every wiſe Man, and Friend to Society, therefore, it muſt appear highly

congruous

congruous with the Poſperity and Preſervation of the State, to maintain with the utmoſt Honour and Dignity, every Law and Juriſdiction that contributes to keep alive the Spirit of Religion, and warms the Affections with the Delight of Virtue.

Whatever Actions the Legiſlature adjudges criminal, whether they reſpect Religion or Morality, or the Civil or Municipal Laws of the Country, muſt be deemed public Offences, and are an Injury to every Individual of the Community, ſeparately, as well as to the whole Body, collectively conſidered; and therefore every Individual has as great an Intereſt in puniſhing a publick Offender of ſuch Laws, as he has a Treſpaſſer upon his Property. In the one he engages in the Cauſe of his Country; in the other, in his own perſonal Cauſe: But in either he has the ſame Right to an equitable Deciſion, whether it affects the publick Good of Society, or the private Property of any individual Member. In either Caſe, the *Proſecutor* ſhould have the ſame Scope, the ſame Liberty, and Privilege, in the Courſe of Juſtice, to ſupport, and make good his Allegations, as the Accuſed has to elude them, or to juſtify himſelf.

Now, by the preſent Practice of the *Eccleſiaſtical Courts*, when any Perſon is cited therein, the *Proſecutor* is obliged to deliver in Articles to the Accuſed, to which he is to plead a general Iſſue only, *viz.* Guilty, or Not Guilty: if he pleads negatively, his Adverſary is aſſigned a certain Time to examine

Witneſſes

Witneſſes to prove the Truth of thoſe Facts the Accuſed denies. But ſhould the *Reſolutions* of the *Committee* paſs into a Law, on a bare Suggeſtion only of the *Defendant*, that he is charged with any criminal Fact in the *Eccleſiaſtical Court*, and has denied the ſame, the *Judges* of the *Common Law* are impowered to grant a *Prohibition*, and to try the Iſſue before the *Secular Courts*; and the *Accuſed* then will have greater Room to evade the Charge, than the *Accuſer* has to ſupport it. For the *Defendant*, in ſuch a Caſe, would have the Choice of *two Courts* to try the Charge in, and the *Plaintiff* be confined to *one*; becauſe the *Plaintiff* can inſtitute the Cauſe in, and muſt abide by the Deciſion of the *Eccleſiaſtical Court* only; but the *Defendant* may try it there, or at the *Common Law*, at his own free and ſpontaneous Election. The *Offender* therefore has the Privilege of *two Courts* to facilitate his Acquittal, the *Plaintiff* but of one to ſupport his Charge. This is repugnant to the firſt Principles of Equity, and unprecedented by any Courts of Juſtice in the Kingdom. Was this to take Place, it would render the Proof of any Crime more difficult, as well as more expenſive to the *Accuſer*; and conſequently fewer would be proſecuted for Offences committed againſt the publick Good: the Laws therefore would become a dead Letter, a mere *Caput Mortuum*, becauſe of the Difficulty of putting them in Execution.

But

But let us ſuppoſe, for Argument Sake, that the *Eccleſiaſtical Judge* be partial, his Partiality is as likely to be exerciſed towards one Party as the other; the *Defendant* then, if he finds the *Eccleſiaſtical Judge* prejudic'd in his Favour, may try the *Iſſue* before him: but when he finds him impartial, and not to be biaſſed, then he may renounce him, juſt as it ſuits his Intereſt. So that this Alteration will give one Party a very conſiderable Advantage over the other, which cannot be too vigilantly guarded againſt by the *Supreme Legiſlature*.

Further, If the firſt Reſolution paſſes into a Law, as is already the Practice of the chief and principal Eccleſiaſtical Courts, the Biaſs or Partiality of theſe Courts collectively conſider'd, tends to acquit the *Accuſed*; becauſe it muſt be ſuppoſed, that the *Proſecutor* giving Security for the Payment of the *Defendant's Coſts*, as well as his own, in caſe of a Failure of Proof, the adverſe Party will accept of none but good Security; if then the *Accuſed* be acquitted, the *Court* is ſure of having the *Coſts* paid on both Sides; whereas if the *Accuſed* was cenſur'd, he might be a poor, indigent and neceſſitous Creature, incapable of paying his own or the *Proſecutor's* Expence; and then, by an Acquittal, the *Court* is certain of their Fees, but by Conviction, their Fees are very precarious and uncertain. Conſider, therefore, this Point, in whatever Light you will, there cannot be the leaſt Reaſon or Motive to any Oppreſ-

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ſion in the Practice of the *Eccleſiaſtical Courts*; but the Removal of any thing from them, muſt be a Violation of the Fundamental Principles of Equity, and conſequently highly prejudicial to the Publick.

Moreover, As it is but conſonant with human Nature, for *Judges* to love Authority, and to preſerve all the Juriſdiction they are capable of; ſo it being always in the Power of the *Defendant* only to remove the *Trial* of the Cauſe, the *Eccleſiaſtical Judge* will ever be under an Influence to Partiality, in Favour of the *Delinquent*, in order to induce him to a Submiſſion to his Juriſdiction; whilſt the *Party Agent* is tyed down to the Determination of one Court only, and muſt abide by that Deciſion and Authority. This would be a Motive to Partiality in Judgment, and an Encouragement to Immorality ariſing from the Law itſelf, which is a Conſideration worthy a *Britiſh* Legiſlature.

Should it be objected, that theſe Inconveniencies may be prevented, by giving the *Proſecutor* Power of removing the *Iſſue* to a *Trial* at *Weſtminſter-Hall*, as well as the *Defendant*, I would anſwer; *viz.* That ſuch Power would reduce the *Party accuſed* to a worſe State than at preſent. For, if a Court of *Common Law* muſt try the Truth of the Fact by the *Verdict* of a *Jury*, the Veracity of ſuch an Accuſation muſt be determin'd by the *Rules* and *Maxims* of the *Common Law*; and, in ſuch a *Caſe*, it is well known

known to all who have a ſlight Knowledge of the Proceedings of thoſe different Courts, that the Courts of *Common Law* admit of *one* Evidence only, and convict upon the bare Teſtimony of one ſingle Witneſs; whereas, by the *Civil* and *Eccleſiaſtical Law*, no Man can be convicted of any Fact, but by the concurrent Atteſtation of two credible Perſons. Many therefore would be convicted in the *Common Law*, where there is only one Evidence to a Fact, who would never have been ſo much as proſecuted in the *Eccleſiaſtical Court*, under its preſent Situation and Oeconomy; ſince it is notorious, Men cannot be convicted there upon the bare Teſtimony of one ſingle Evidence.

It is farther worth conſidering, that this Manner of proceeding would be dividing every Cauſe into two diſtinct Cauſes; for the Cauſe would be inſtituted in the *Eccleſiaſtical Court*, Articles given in, and admitted there againſt the *Defendant*, and *Iſſue* join'd thereupon, according to their Courſe of Proceeding, and all other regular Gradations made towards trying the Fact in the *Eccleſiaſtical Court*, 'till one of the *Parties* moves for a *Prohibition*. When a *Prohibition* is obtain'd, the *Iſſue* to be tryed at *Common Law*, muſt be brought before their *Courts*, and the Matter in Queſtion muſt paſs the whole Progreſſion of the *Common Law* Forms; a *Suggeſtion* muſt be drawn, a *Motion* for a *Prohibition* muſt be made by *Council* feed for that Purpoſe; a *Declaration* and *Iſſue* join'd

 there,

there, according to their Method; a *Record* made up, all the various *Writs* and *Notices* made out and executed, and attended with all the *Forms* and *Solemnities* of other *Cauſes*, which have their original Commencement in the Secular Courts; and, after all, a Conſultation made out to the *Eccleſiaſtical Courts*, to ſet the *Cauſe* there in the ſame State it was at the time of its *Removal*, the Determination of the Fact only excepted.

Here it will not be improper to obſerve, that in all the Proceedings on a *Prohibition* in the Courts of Law, the *Practicers* charge, and, as I am well inform'd, are allow'd *double* the *Fees* they have in other *Cauſes*; which renders *Trials* on *Prohibitions* prodigiouſly expenſive to the *Suitors*. This ſtrong Incitement of *Double Fees* to Attornies, makes them very vigilant and induſtrious to lay every Cauſe in the *Eccleſiaſtical Courts* before the *Judges* of the *Common Law*, in order to obtain a *Prohibition*; ſo that no *Cauſe* can poſſibly be continued in the *Eccleſiaſtical Courts*, where there is, either originally, or ariſes in the Courſe of *the* Proceedings, any the leaſt Foundation for a *Prohibition*; the *Eccleſiaſtical Courts* at the ſame time remain totally ignorant of what *Cauſes*, properly cognizable before them, may be brought in the *Courts* of *Law*; or, if they did know, are no ways provided to contend with them in Point of Juriſdiction.

From

From this View of the Caſe, it is but natural to think, that in doubtful Points, and perplex'd Caſes, where the Reaſons, whether a *Prohibition* ought to be granted or not, hang on an Equilibrium, the Turn of the Scale is always in Favour of the Courts of Law; which renders the *Eccleſiaſtical Juriſdiction* in a State of Declenſion, even in its preſent Circumſtances. We may therefore conclude, that were it not for the Integrity and Wiſdom of thoſe *Sages*, who conſtantly fill the *Benches* of the Common Law Courts, the preſent Power of *Eccleſiaſtical Courts* would ſoon wear away, by the continual *Nibblings* of that great Diſproportion of Common Law *Practicers*, who, from their natural Prejudices, as well as the prevailing Influence of *Double Fees* would be always exerciſing their whole Strength and Artifice againſt them.

To this may be added, by removing the *Trial* of the Fact to *Weſtminſter-Hall* in any Criminal Charge, the *Eccleſiaſtical Courts* would become chiefly *miniſterial*; the Proceedings therein, Matter of Form only, and the Advice of *Civilians* in no wiſe neceſſary, after the firſt Formation and Admiſſion of the Accuſation: So that the greateſt Loſs, with Regard to Profit, would inevitably fall upon the Advocates of the *Civil Law*, whoſe immoveable Integrity, and amiable Abilities, render them worthy of the higheſt Eſteem and Regard.

Beſides, in the Eccleſiaſtical Courts, it is frequent, in one and the ſame Cauſe, to lay ſeveral Facts toge-

ther, charged to have been committed at various times, in the Articles exhibited againſt the Party accuſed; one whereof being proved, ſubjects him to Eccleſiaſtical Cenſure: But all thoſe Facts are tryed under one common *General Iſſue*, and make but one ſingle *Cauſe* throughout the Proceſs; and when many Facts are charged, and only one ſingle one, or very few, are proved; tho' the *Accuſed* be thereby pronounc'd to have incurr'd ſuch Penalties as the Law inflicts on ſuch Offences, which are prov'd upon him; yet the *Party* cenſur'd, in ſuch a Caſe, is never condemn'd in the Coſts of the whole Suit on the Part of the Adverſary, but in ſuch a Proportion of the Coſts only, as was neceſſary to make Proof of that ſingle Part of the Articles which appear'd to be unexceptionably prov'd againſt him; and the Expences extraordinary, on both Sides, occaſion'd by the Allegations of many Facts which remain unproved, are conſider'd in the *Taxation*; and the *Promoter*, frequently, tho' he comes off victorious, is, notwithſtanding oblig'd to pay near all his own Charges, when it is apparent to the Court, that he has occaſion'd unneceſſary and ſuperfluous Expences.

This indiſputably juſt and equitable Practice of the *Eccleſiaſtical Courts*, in moderating the Expence of the Accuſed in Proportion to the Offence, will be entirely obſtructed and defeated; becauſe, if the *General Iſſue*, given in the *Eccleſiaſtical Courts*, upon the whole Accuſation, which may conſiſt of divers Facts,

Facts, laid in different Articles, is to be tried at *Weſtminſter-Hall*, the *Jury* muſt, upon the *Iſſue*, find the *Accuſed* guilty, or not guilty; ſo that if only one *ſimple Fact* amongſt the Number contain'd in the Articles, which incurr'd *Eccleſiaſtical Cenſure*, be proved at *Common Law*, the *Jury* muſt give a *general Verdict*, and find the *Party* guilty of the whole Accuſation, as well of thoſe Facts unproved, as thoſe which have been prov'd: In ſuch a Caſe, the *Eccleſiaſtical Judge* would be oblig'd to inflict a Puniſhment, and tax the Expences according to the Determination of the *Common Law*; which would be a very great Grievance to the Subject.

Should a *Special Verdict* be found, yet that will not reduce the Caſe to a more equitable State; for that *Special Verdict* muſt be either ſent to the *Eccleſiaſtical Court*, or be argued before the *Judges* of the *Common Law*; and no one, who has the leaſt Acquaintance with the Proceedings in the *Eccleſiaſtical Courts*, will ever think the Condition of the Criminal meliorated by a *Special Verdict*; which, as the *Common Law* directs, is well known to be very tedious, and very expenſive. Nor,

Would the Caſe be rendered more juſt and reaſonable, if all the Facts, charged in the *Articles* exhibited in the *Eccleſiaſtical Courts*, were to be tried ſingly and disjunctively, upon ſo many different *Iſſues* as there are Facts; for then the *Articles*, which now make but one general Charge in the *Eccleſi-*

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aſtical Courts, and are tried upon one general *Negative*, or *Iſſue*, muſt, at *Weſtminſter-Hall*, be divided into ſo many different Cauſes, and ſo many different *Pleas* or *Iſſues*, as there are Facts alledged in the original *Articles*; every one of which are chargeable with their regular Fees, to all *Offices* and *Officers* neceſſary to be employed in conducting the Affair.

As ſo many apparent Difficulties and Inconveniencies preſent themſelves at a tranſient and curſory View of this important Affair, it is not at all unreaſonable to conclude, that there are many others latent and inviſible, which by a Courſe of Experience will diſplay themſelves, ſhould the Reſolutions of the Committee paſs into a Law.

Stripping and diveſting the *Eccleſiaſtical Courts* of that Power, which they have always uninterruptedly exerciſed, of compelling, *ex Officio*, *Executors* to prove the *Wills* of their *Teſtators*, or to accept Letters of *Adminiſtration* of *Inteſtate Eſtates*, where the *Eſtate* is of any competent Value, appears to me to be attended with divers extraordinary Inconveniencies to the Subject.

And firſt, in Point of *Wills*, it is to be conſider'd, that none but *Creditors*, *Relations*, or *Legatees* have Power to cauſe a *Will* to be proved; and therefore, we may very naturally ask this Queſtion, *viz.* How ſhall a *Legatee* know that he is ſuch? or, If a *Legatee* ſues to have a *Will* proved, (altho' he be really a *Le-*

a *Legatee* named in the *Will*, and the *Will* be ſecretly put into the Hands of a fraudulent *Executor*; and no Body can prove the Contents of it, but by producing it) the Executor may, when he is cited, appear, and deny the Intereſt of the *Plaintiff* to cite him, by affirming that he is not a *Legatee*. In ſuch a Caſe, the *Legatee* muſt prove his *Intereſt* and *Title* to ſue, before the *Court* has any Power or Juriſdiction to compel the *Executor* to produce the *Will*. The Legatee therefore will find himſelf reduced to an inextricable *Dilemma*; on the one Hand, he cannot prove his *Legacy*, without Production of the *Will*; on the other Hand, he cannot oblige the *Executor* to produce it, till he has proved his *Legacy*. Should the *Legiſlature* impower the *Court* with Authority to compel the *Executor* to produce the *Will*, upon a mere Suggeſtion of any *Party* that he is a *Legatee*; yet an unjuſt and litigious *Executor* will not do this, till Proceſs be taken out againſt him; nor then neither, till he has put the *Suitor* to the greateſt Expence the Law will admit of; and if, after all, the *Legatee* ſhould be miſtaken, and appear to have nothing left him by the *Will*, he muſt pay the whole Expence, as well that of the *Executor*, as his own; which moſt certainly would be laying the Subject under a very great Hardſhip: which will ſtill further appear, if we conſider, that few Men of any conſiderable Fortune, Family, and Acquaintance die, but there are great Numbers of Perſons, who

expect

expect to have *Legacies*, that are diſappointed: but the Hopes of having been remembered by the Deceaſed, would excite them to procure a Sight of the *Will*, which then could not be done without the Expence of a *Suit* againſt the *Executor*; whereas, in the preſent Circumſtances, they may have the ſame Satisfaction at the Expence of a Shilling only. But further,

This Alteration in our Conſtitution would give great Opportunities for *Forgery*; to which no *Inſtruments* are more liable than *Wills*; becauſe the Perſon being dead, and his *Executors* not being privy to the Courſe and Tranſactions of his Life, cannot be furniſhed with ſuch proper Matter to plead in Oppoſition to the Forgery, as the *Teſtator* could have done, if living; or as other Perſons can, who have their Deeds forged againſt them, in their Lifetime. Further,

The Diſſimilitude of the Hand-writing of the Deceaſed to a *Will*, can be no Evidence; at leaſt, not ſo much towards ſetting it aſide, as in other Inſtruments; and for this plain Reaſon, becauſe Men generally making their *Wills* under great Weakneſs, and often in the Paroxyſm of ſome violent Diſtemper, can ſeldom write their Names according to their uſual Manner and Character; and frequently Men, who, when in Health, write fair legible Hands, are obliged only to make their *Mark* to their *Wills*.

Again:

Again: If no *Executor* be obliged to prove a *Will* without Compulſion of ſome *Legatee*, *Relation*, or *Creditor*, as before obſerved, great Numbers of *Wills* of Men, leaving very conſiderable *Eſtates*, will be kept privately by the *Executors*, and never publickly exhibited; or at leaſt, kept privately by the *Executor*, for many Years after the *Teſtator*'s Death; from whence would ariſe the Danger of *Forgery*. For an artful, cunning, practiſing Villain may, by ſome Means, learn from the Family, the *Date*, *Place*, and *Time* of *Execution*, and all other Circumſtances relating to the genuine *Will*; and when the *Will* appears to be made ſome conſiderable Time before the *Teſtator*'s Death, may trace the Life of the Deceaſed from the Date of his *real Will* to his Death: and perhaps diſcover ſome real Declarations of the Deceaſed, at certain Junctures, and upon very particular Occaſions, ſignifying his Intention to alter that *Will*, or to change his Mind, with reſpect to ſome certain *Legatees* therein mentioned. Thus a *Sharper*, by making himſelf acquainted with the Manner of Life of the Deceaſed, and tranſacting his Affairs, may fix upon a *Time* and *Place* to aſſert his *forged Will* to have been duly and juſtly executed by the Deceaſed; and may form a Scheme to account for the Deceaſed's being *then*, at that very *Place*, from ſome real Paſſages of his Life: ſuitable thereto he may inſtruct his perjured *Witneſſes* with Anſwers to all ſuch *Interrogatories* as poſſibly may occur in

controverting the Reality of his *Forgery*, and thereby give their falſe Depoſitions the Sanction of a natural and uniform Teſtimony.

Thus a *Villain* may have the Space of many Years to frame, examine, and complete his iniquitous Scheme, while the poor innocent *Executors* and *Legatees* of the Deceaſed's *true Will*, unſuſpecting ſuch Frauds to be hatching, may, in a long Time, have loſt all Remembrance of the Tranſactions of the Deceaſed, which would be neceſſary to have been brought to Light, to invalidate the Allegations and Evidence of the *Forger*: their Witneſſes may be dead, or removed to diſtant Parts, beyond the Seas; and they incapable of making regular and complete Proof, even of the *Execution* of the *real Will*, much leſs to diſprove the *Forgery*.

It can be of no Conſideration before a Court of Juſtice, that the *Forger* concealed his *Will* for ſeveral Years after the Death of the Deceaſed; becauſe that Objection will be common to each Party, both the *Wills*, before the Court, being preſumed regularly executed, till the contrary is proved; and the *Forger* will plead as good a Right to conceal his *Will*, for ſeveral Years after the Deceaſed's Death, as the real *Executor* can for his.

But as the Law now ſtands, the Executor muſt exhibit the *Will* ſoon after the Death of the Deceaſed into ſome *Publick Office*, where the Law preſumes all Perſons to know of it; and then if another *Will*

be

be produced at a Diſtance of Time after the firſt *Will* has been ſo publickly exhibited, the proving of the firſt, ſo depoſited, and lying unoppoſed, will be, and has often been found ſo cogent a Circumſtance in Prejudice to the latter, that nothing but ſome very extraordinary ſtrong, clear, and unexceptionable Evidence can be able to ſet aſide the former.

And here naturally ariſes an Obſervation; that by ſuch a Law, not only very great Inconveniencies would ariſe, to the Security of the private Subject, in the Enjoyment of his Property, but the *Publick Revenue* would be greatly diminiſhed. For as the Law now ſtands, every *Probate* or *Adminiſtration*, where the *Eſtate* of the Deceaſed amounts to *Twenty Pounds*, muſt be made on a *Ten Shilling Stamp*, beſides the *Stamps* of the *Bonds*; but ſhould theſe be taken out only by the *Relations*, *Debtors*, and *Legatees*, there could not be one half of the Quantity, nay, (in ſome Countries, where, it is well known, all *Debtors* incautiouſly pay their Debts to the *Executors* or *Widows* of the Deceaſed, without enquiring after the *Probate* or *Adminiſtration*) I may venture to ſay, not one tenth Part of the *Wills* or *Adminiſtrations*, now taken out, would be granted at all; whereby the *Publick* would loſe the greateſt Part of the *whole Revenue*, ariſing from the *Eccleſiaſtical* Juriſdiction; that Branch only, being near equal, if not more than all the reſt taken together. And here we may obſerve, that the Removing of any Trial to the Courts of Law, will

be attended with a further Loſs to the *Publick Revenue*; for it is well known that by far the greateſt Part of the *Revenue*, ariſing from all Proceedings of the *Eccleſiaſtical Courts*, in Matters under Litigation, are from the *Depoſitions* of *Witneſſes*, and *Copies* thereof for the various *Parties*, which will be loſt by ſuch Tranſlation of *Trials*.

Another great Inconvenience, which will ariſe from diveſting the *Eccleſiaſtical Courts* of the Power of compelling *Wills* to be brought in and regiſtred, is, that many *Wills* of great Importance will never be brought into the Office, where the Publick may be ſatisfied of their Contents, and the Nature of their Exiſtence. The Intention of thoſe Acts of Parliament (which Experience has evinced to be highly conducive to the Prevention of Frauds and Law Suits) for regiſtring all *Deeds* relating to the *Title* and *Incumbrances* of Freehold Eſtates, in ſeveral very great and wealthy Counties, will, in a great Meaſure, be defeated, or rendered ineffectual; for it will be a very precarious Security to a Purchaſer, to know the *Effect* of all *Mortgages* and *Incumbrances* charged upon any Eſtate, by his precedent Poſſeſſors, when the Law, as in the ſuppoſed Caſe it will, admits of a Will being produced from private Hands that may deſtroy the original Title.

As to the Care and Management of *Churches*, I cannot ſuppoſe there is any Intention of diveſting the

Biſhop

Biſhop of his Guardianſhip of them, and of his Power of compelling the Inhabitants to repair them, as well as provide for all other Neceſſaries of Decency in the Celebration of Divine Worſhip. This Power is certainly highly neceſſary to be veſted in ſome Perſon, or all the *Churches* in the Kingdom, and every thing expedient for the Performance of religious Offices, would, in a ſhort Period of Time, decay; and all Ideas of Religion be loſt and extinguiſh'd from the Minds of the ſhort-ſighted unreflecting Multitude: Whereby the State would ſoon ſtand on a very tottering Foundation, and, agreeable to the Metaphor of the great Sir *William Temple*, in the Form of a *Pyramid*, with its Point downwards, which, however well pois'd, would always be liable to fall on the firſt Blaſt of Wind.

However, to do this, the *Biſhop* muſt have a *judicial Power*; for if his Power be not ſo, but only a Right to ſue in any other Court, to have the Inhabitants compell'd to their Duty, it would be, in effect, no Proviſion at all: Or, if the *Ordinary* be inveſted with Authority to command a Reparation of a *Church*, and yet has not Authority to adjuſt the Aſſeſſment of the *Pariſhioners*, and oblige them to pay their reſpective Proportions towards it, the Caſe would not be much better. For the *Ordinary* muſt then proceed againſt, and admoniſh the *Church-Warden* to repair, when he adjudges the *Church* to require it; and in default thereof, the *Church-Warden* is liable

liable to Impriſonment, either as the Effect of Excommunication, or by the Power of an Attachment, if the Legiſlature ſhould think proper to arm the *Ordinary* with ſuch *Writs*.

Now, a poor *Church-Warden* has no other Ways to comply with the Monition of his *Ordinary*, than raiſing Money by an *Aſſeſſment* upon the *Pariſhioners*, to enable him to perform what the Ordinary ſhall injoin him. Should the *Pariſhioners* refuſe to pay ſuch *Aſſeſſment*, and he ſues them in a *Temporal Court*, where the Poors Rate are ſued for, whether the Repairs, for which the Aſſeſſment is made, be neceſſary, or not, ſuch a *Court* will take upon them to determine. And if the *Temporal Court* adjudges them unneceſſary, the *Church-Warden* cannot recover his Aſſeſſment, but muſt go to a Gaol, without being in any Degree criminal, only becauſe two *Courts* differ in their Determinations of the Expediency of their Churches Reparations.

But this is a Subject of too copious a Nature, to be enlarg'd upon in ſo ſhort a Work.

I cannot here omit ſome Mention of the Subject of *Clandeſtine Marriages*, now under Conſideration of *Parliament*. This is a Work worthy the Regard of every *Patriot*, and requires the ſevereſt Scrutiny into, and the moſt extenſive Knowledge of the various Sources from which they ariſe, to form an effectual Law to prevent them.

It is not very marvellous, if ſome, amongſt the various Branches of Men, who have had the Care of granting thoſe *Faculties*, have been leſs circumſpect in their Office, or have given a greater Latitude to their perſonal Intereſt, than the Duty of their Office admits of.

Nor can it be expected, that any Claſs of Men, of that Number, can ever exiſt, without ſome bad and ſcandalous *Practicers* amongſt them: But, as we can have no Apprehenſion that a *Britiſh* Legiſlature will ever involve a great Body of innocent and regular *Practicers* in one common Puniſhment with a few offending Brethren, I ſhall only obſerve, that the Legal Fees due to thoſe *Officers* faithfully diſcharging their Duty, is a Right of *Freehold* in thoſe Officers; and they, and their *Predeceſſors*, have always been taxed, and pay as *Freeholders* for the ſame.

It may further be obſerv'd, that any Diminution of thoſe Offices, is ſo much Loſs to the Crown. For as the Crown has only a negative Voice in its Legiſlative Capacity, which is but a ſmall Weight in Oppoſition to the Power of either of the other two Legiſlative Powers, its eſſential Strength muſt conſiſt in having the executive Power, *viz.* the appointing all *Officers* and *Dignitaries*, *Eccleſiaſtical*, *Civil*, and *Military*. Now this Power of the Crown does not conſiſt in the Number of thoſe *Miniſters*, but in the Authority, Dignity, and Grandeur annex'd to the

Offices

Offices they poſſeſs; ſo that every Diminution of Power or Authority in any of the great Offices or Functions of the State, is the ſame Loſs of Power to the Crown; as the total Abolition of other leſſer Officers, whoſe whole Strength is only equal to that Branch taken from a greater.

Hence it follows, that the lopping off any Part of the antient and immemorable Rights and Juriſdiction of the *Eccleſiaſtical Courts*, or the *Officers* thereof, and throwing it into other Channels, muſt be ſtripping the Crown of ſo much Power; becauſe, all the *Officers* and *Miniſters* of the *Eccleſiaſtical Courts*, are conſtituted and appointed by the *Biſhops*, either perſonally, or ſubordinately, by others to whom they delegate that Power. The *Biſhops* themſelves therefore, in their Appointment of thoſe *Officers*, are only as intermediate Agents of the Crown, entruſted with that particular Power. Now, the enacting of a Law that takes away the greateſt Part of Eccleſiaſtical Right and Juriſdiction, muſt make thoſe Offices of leſs Value; and thereby the *Biſhop* has leſs to diſpoſe of, which renders his *Biſhoprick* leſs valuable, and conſequently the *King* has leſs to beſtow in appointing the *Biſhops*; and the *Biſhops* therefore leſs able to aſſiſt him on any emergent Occaſion.

From this clear and intelligible way of Reaſoning, it is evident, that if we trace the Effects of ſuch a Law to its principal Reſource, the Loſs of all the Power taken from the Courts of Civil Law, ultimately terminates

minates in his *Majeſty*, and is an Infringement upon the Prerogative of the Crown.

However, as the Ruin of ſo many have been effected by *Clandeſtine Marriages*, it is the Duty of every ſubject to contribute all in his Power to prevent them. But, as it is yet unknown what *Reſolutions* the *Parliament* may come to on this Head, any Sentiments of a private Subject cannot be preſum'd unthought of by ſo wiſe a Body. The Propoſal of a Scheme for that Purpoſe, or for any other Reformation in the *Eccleſiaſtical Courts*, may prove of more Trouble to the Reader, than real Uſe to the Subject under Conſideration. However, if on the Publication of their *Reſolutions*, any thing ſhould occur that may appear conducive to ſo good and laudable an End, I ſhall freely, honeſtly, and unprejudicially, communicate my Obſervations to the Publick.

At preſent I ſhall only remark, that as the *Church* has been long beſieg'd with the Artillery of *Infidelity*, it muſt appear to every Friend to the *Conſtitution*, a very improper Juncture to leſſen the Strength and Dignity of the *Church*, in Diminution of the *Prerogative*, and the Publick *Revenue*.

FINIS.